

No. 03-19-00198-CV

In the Court of Appeals
Third Judicial District

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JEFFREY D. KYLE
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Madeleine Connor,
Appellant

VS.

Douglas Hooks,
Appellee

**Brief of Amicus Curiae Challenging the
Constitutionality of the Texas Vexatious Litigant Statutes**

From the 201st District Court of Travis County, Texas
Cause number D-1-GN-18-005130
The Honorable Catherine Mauzy, District Judge Presiding

Respectfully submitted,

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AMICUS' ISSUE NO. (1):

That the Order, finding and mis-declaring Appellant a vexatious litigant, is fundamental error and void for lack of subject matter jurisdiction because it applied the Texas Vexatious Litigant Statutes, which are **facially unconstitutional** because:

1. The Statutes abridge the First Amendment guarantees of freedom to petition for redress of grievances and for unfettered Court access, as well as, violate and consequently abridge Fourteenth Amendment guaranteed freedoms to equal protection of the law, as well as, due process and course of law;
2. The Statutes violate Texas Constitution's guaranteed freedom to petition for redress of grievances with remedy by due course of law, as well as, the open Courts provision.

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Amicus Curiae Statement of the Case

Amicus identifies that the instant brief is tendered on behalf the Appellant, **Madeleine Connor**, as well as all other Texas citizens, because the Texas Vexatious Litigant Statutes' misapplications have voided their constitutional freedoms.

No one has paid this *Amicus* any fee or anything of value nor *Amicus* accept any such for preparing this brief.

Amicus certifies that he has e-served all parties including the Texas Attorney General with copies of this brief; and,

Amicus concurs with Appellant Connor's "Statement of the Case" as it relates to the legal question of the facial unconstitutionality of Texas Civil Practices and Remedies Code Chapter 11.

STATEMENT OF URGENCY TO REVIEW STATUTES' CONSTITUTIONALITY

The Texas Vexatious Litigant Statutes¹ do not just deprive Appellant of the First Amendment guaranteed freedom to petition and access Courts, and the Fourteenth Amendment guarantee of equal protection of the law, they deprive Appellant all constitutional protections.

Without the unfettered freedom to Court access, the First and Fourteenth Amendments' protections are meaningless.

All state and federal Courts share the express common duty to “*preserve, protect and defend*” the United States Constitution, however as shown herein all Texas Courts' have refused to preserve, protect and defend this core First Amendment unfettered freedom to petition and for Court access with regards to the Vexatious Litigant Statutes.

Specifically, the Texas Supreme Court has refused thirty-nine (39) times² since 2005, to review constitutional challenges to these statutes, and the Courts of Appeals have only addressed constitutional challenges in eight (8) of the one hundred-nineteen (119) published cases³, and, as shown hereinbelow, denied all challenges, absent any First Amendment

¹ Texas Civil Practices and Remedies Code Chapter 11.

² 1. *Nunu v. Risk*, TXSC19-0284; 2. *McCann v. Spencer Plantation Investments In re Douglas*, TXSC18-1079; 3. *Vodicka v. A.H. Belo Corp.* TXSC18-0897; 4. *Nixon v. Attorney General of Texas* TXSC18-1005; 5. *Jones v. Anderson* TXSC18-0578; 6. *In re S.V.* TXSC17-0877; 7. *Yazdchi v. BBVA Compass Bank*, TXSC17-0675; 8. *In re Guardianship of Estate of L. S* TXSC17-0429; 9. *Harper v. State* TXSC16-0739; 10. *Yazdchi v. Jones* TXSC16-0844; 11. *Akinwamide v. Transportation Insurance Co.* TXSC16-0962; 12. *McClain v. Dell Inc.*, TXSC15-0872; 13. *Jones v. Markel*, TXSC15-0869; 14. *Judd v. Corey-Steele* TXSC15-0386; 15. *Sparkman v. Microsoft Corp.* TXSC15-0347; 16. *Thomas v. Texas Department of Criminal Justice Officer Adams*, TXSC14-1023; 17. *Thomas v. Texas Department of Criminal Justice-Institutional Division*, TXSC14-0515; 18. *Serrano v. Pellicano Park, L.L.C.*, TXSC14-0455; 19. *Douglas v. Redmond*, TXSC13-0145; 20. *Kastner v. Martin & Drought, P.C.*, TXSC11-0648; 21. *James v. Parish*, TXSC11-0229; 22. *Luckett v. Brinker Restaurant Corp.*, TXSC11-0118; 23. *Jon v. Gaston*, TXSC10-1033; 24. *In re Douglas*, TXSC11-0056; 25. *Salazar v. Service Corporation International* TXSC10-0313; 26. *Sweed v. Nye* TXSC10-0264; 27. *Clifton v. Walters*, TXSC10-0359; 28. *Smith v. Livingston*, TXSC10-0080; 29. *Cantu v. Dominguez*, TXSC10-0218; 30. *Drum v. Calhoun*, TXSC10-0073; 31. *Drake v. Andrews*, TXSC09-0932; 32. *Wanzer v. Garcia*, TXSC09-0710; 33. *In re Kim*, TXSC09-0468; 34. *Akinwamide v. Transportation Insurance Co.* TXSC08-0496; 35. *Wakeland v. Wakeland*, TXSC08-0249; 36. *Brown v. Texas State Board of Nurse Examiners*, TXSC07-1001; 37. *In re Andrews*, TXSC07-0687; 38. *Willms v. Americas Tire Co., Inc.*, TXSC06-0359; 39. *Leonard v. Abbott*, TXSC05-0848.

³ Casemaker Texas search “vexatious litigant 11.054”.

substantive analysis, thus wholly failing to protect this core First Amendment freedom.

These failures deprive all Texas citizens equal protection of core First and Fourteenth Amendment guaranteed privileges and immunities.

The Texas Supreme Court's denial of review thirty-nine (39) times enables all Texas Courts to ignore precious constitutional privileges and immunities, which they have done repeatedly when dealing with these Statutes.

The Vexatious Litigant Statutes, chill, if not totally freeze First Amendment freedoms and void Appellants' *pro se* access to the Rule of Law, which seemingly also affects many other Texas citizens, as this Courts' own website's voluminous vexatious litigant database establishes.⁴

“A law repugnant to the Constitution is void. An act of Congress repugnant to the Constitution cannot become a law. **The Constitution supersedes all other laws and the individual's rights shall be liberally enforced in favor of him, the clearly intended and expressly designated beneficiary.**” –*Marbury v. Madison*, 5 U.S. 137 (1803)

“An unconstitutional law is void and is as no law. An offense created by it is not crime. A conviction under it is not merely erroneous but is illegal and void and cannot be used as a legal cause of imprisonment.” – *Ex parte Siebold*, 100 U.S. 371, 376 (1879)

“An unconstitutional act is not law. It confers no rights; it imposes no duties; affords no protection; it creates no office. It is, in legal contemplation, as inoperative as though it had never been passed.” – *Norton v. Shelby County*, 118 U.S. 425, 442 (1886)

“Where rights secured by the Constitution are involved, there can be no rule-making or legislation which would abrogate them.” *Miranda v. Arizona*, 384 U.S. 436, 491 (1966)

⁴ <https://www.txcourts.gov/judicial-data/vexatious-litigants/>

Statement Regarding Oral Argument:

Amicus Curiae believes Oral argument is appropriate because the Trial Courts' Order misapplied the unconstitutional Texas Vexatious Litigant Statutes, Texas Civil Practice & Remedies Code §11.054⁵ and §§ 11.101⁶, *et sequitur*, ("Statutes") as the referenced Court Orders have unconstitutionally hindered and effectively blocked Appellant's *propria persona* unfettered Court access violative of Texas Constitution and United States Constitution First Amendment guaranteed freedoms, , averring in support therefore:

⁵ **Tex. Civ. Prac. and Rem. Code § 11.054. Criteria For Finding Plaintiff A Vexatious Litigant**

A court may find a plaintiff a vexatious litigant **if the defendant shows that there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant and that:**

(1) the plaintiff, in the seven-year period immediately preceding the date the defendant makes the motion under Section 11.051, has commenced, prosecuted, or maintained at least **five** litigations as a ***pro se*** litigant other than in a small claims court that have been: (A) **finally determined adversely to the plaintiff**; (B) permitted to remain pending at least two years without having been brought to trial or hearing; **or** (C) determined by a trial or Appellate court to be frivolous or groundless under state or federal laws or rules of procedure;

(2) **after a litigation has been finally determined against the plaintiff, the plaintiff repeatedly relitigates or attempts to relitigate, pro se, either:** (A) the validity of the determination against the same defendant as to whom the litigation was finally determined; or (B) the cause of action, claim, controversy, or any of the issues of fact or law determined **or concluded by the final determination against the same defendant as to whom the litigation was finally determined; or** (Our Emphasis.)

(3) the plaintiff has previously been declared to be a vexatious litigant by a state or federal court in an action or proceeding based on the same or substantially similar facts, transition, or occurrence.

⁶ **Tex. Civ. Prac. and Rem. Code § 11.101. Prefiling Order; Contempt**

(a) **A court may**, on its own motion or the motion of any party, **enter an order prohibiting a person from filing, pro se, a new litigation in a court to which the order Applies under this section without permission of the Appropriate local administrative judge** described by Section 11.102(a) to file the litigation ***IF* the court finds, after notice and hearing as provided by Subchapter B, that the person is a vexatious litigant.**

(b) **A person who disobeys an order under Subsection (a) is subject to contempt of court.**

(c) **A litigant may Appeal from a prefiling order entered under Subsection (a) designating the person a vexatious litigant.**

(d) **A prefiling order entered under Subsection (a) by a justice or constitutional county court Applies only to the court that entered the order.**

(e) **A prefiling order entered under Subsection (a) by a district or statutory county court Applies to each court in this state. (Our Emphasis.)**

AMICUS ISSUES PRESENTED

AMICUS' ISSUE NO. (1):

That the Order, finding and mis-declaring Appellant a vexatious litigant, is fundamental error and void for lack of subject matter jurisdiction because it applied the Texas Vexatious Litigant Statutes, which are **facially unconstitutional** because:

- 1 The Statutes abridge the First Amendment guarantees of freedom to petition for redress of grievances and for unfettered Court access, as well as, violate and consequently abridge Fourteenth Amendment guaranteed freedoms to equal protection of the law, as well as, due process and course of law;
- 2 The Statutes violate Texas Constitution's guaranteed freedom to petition for redress of grievances with remedy by due course of law, as well as, the open Courts provision.

Standard of Review

Amicus Curiae's declaratory relief regards Tex. Civ. Prac. & Rem. Code §§ 11.054 and 11.101, *et sequitur's*⁷ statutory construction as unconstitutionally misapplied contrary to and violative of United States and Texas' Constitutions.

The issues presented turn on pure questions of law.

Therefore, the proper standard of review is *de novo*.⁸

Questions of law that require *de novo* standard of review include statutory construction.⁹

Trial Courts abuse discretion when acting arbitrarily or unreasonably or without reference to any guiding rules and principles.¹⁰

⁷ App1.

⁸ ***El Paso Nat. Gas Co vs Minco Oil & Gas, Inc.***, 8 S.W.3d 309, 312 (Tex. 1999).

⁹ ***Exxonmobil Pipeline Company v. Coleman***, 512 S.W.3d 895, 898 (Tex. 2017); ***McIntyre v. Ramirez*** 109 S.W.3d 741, 745 (Tex. 2003).

¹⁰ ***Bowie Mem'l Hosp. v. Wright***, 79 S.W.3d 48, 52 (Tex. 2002).

To the Honorable Texas Third Court of Appeals

This petition invokes this Courts' subject matter jurisdiction as a gatekeeper and guardian of United States and Texas' civil and constitutional rights applied in Texas Courts.

This is a case of first impression for Texas Appellate Courts. No other Appellate Court has addressed a First Amendment challenge to application of the Vexatious Litigant Statutes

Appellant challenges the Statutes, as *per se* abridgments of Appellant's First Amendment unfettered freedom to petition for redress of grievances and Court access .

The United States Supreme Court has declared the First Amendment freedom to petition for redress of grievances and Court access to be a cognate right, equal in dignity to the freedom of speech, and the right conservative of all other rights the United States Constitution protects.

Clear and present danger, as well as, clear public interest, not doubtfully or remotely threatened danger solely will or could justify any attempt to restrict First Amendment liberties.

In this case the Trial Court declared Appellant a vexatious litigant and declared forfeit and severely restricted her unfettered freedom to *pro se* Court access.

These Statutes' enforcement is *anathema* to the United States and Texas Constitutions.

There is no Texas statutory authority nor are there any state or federal appellate cases permitting restriction of a citizen's freedom of speech for offending speech.

The same constitutional standard for freedom of speech applies to freedom to petition for redress of grievances and Court access.

The Order misapplying the Vexatious Litigant Statutes, abridged Appellant's First Amendment unfettered freedom to *pro se* Court access is therefore void.

The freedom to petition and for Court access are federally protected constitutional rights that the State cannot declare forfeited.

Freedom is not free and without every citizen's unfettered freedom to petition and access the Courts to enforce these guaranteed freedoms, there can be no freedom nor Rule of Law. Only tyranny.

Summary of the Argument

This language "*Congress shall make no law. . .abridging. . . the right of the people to petition the Government for a redress of grievances.*" and "*No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States*" constitutes a constitutional mandate binding upon the State of Texas.

Despite the United States Constitutional mandates for a person's unfettered right to petition for redress of grievances through Court access, the Texas Legislature enacted the 1997 Texas Vexatious Litigant Statutes,¹¹ ("the Statutes") thereby creating prior restraint and restriction of previously unfettered access to Texas Courts.

The State of Texas violated these constitutional mandates when it enacted the Vexatious Litigant Statutes, as well as, each and every time Texas Courts have unconstitutionally applied these Statutes against United States citizens.

The unfettered right of Court access has been a fundamental human right since the Athenian Democracy more than 2300 years ago through to the present times.

The Statutes directly and completely abridge guaranteed First Amendment freedoms of expression, as well as, to petition and for Court access.

¹¹ Tex. Civ. Prac. & Rem Chapter 11, §§11.001 through § 11.104.

The statutes also abridge the Fourteenth Amendment guaranteed freedom that “*No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States*”.

The Texas Courts’ refusal to review First Amendment challenges also abridges the Fourteenth Amendment prohibition that no state “*deny to any person within its jurisdiction the equal protection of the laws*”.

Ignoring constitutional privileges and immunities denies equal protection of the law and is the equivalent of denying an opportunity to be heard.¹²

The Statutes are a prior restraint of First Amendment freedoms because they authorize a pre-filing permanent injunction restricting access to Texas Courts prohibiting all *pro se* access to Texas Courts without pre-filing government permission, punishable by contempt.

The Statutes also require pre-filing notice to all defendants named, and a pre-filing determination of the validity of the claim with no right of appeal if an administrative Court denies permission.

No one could possibly reconcile these statutory restrictions with the cognate First Amendment core freedom of the people to petition for redress of grievances.

History of the Right to Petition and for Unfettered Court Access: Peaceful Dispute Resolution

The right of unfettered Court access is the promise for the Rule of Law, without which promise there is no rule of law.

In the Western World from the 1215 ***Magna Carta*** to the 1776 Declaration of

¹²***Logan v. Zimmerman Brush Co.***, 455 U.S. 422, 428, (1982).

Independence to the 1789 First Amendment's core, the unfettered right to petition and access the courts has been a fundamental human right.

The objective historical literature repeatedly identifies as the essential root of Rule of Law the unfettered access to erected tribunals, now our Courts, for the peaceful, logical and reasonable resolution of member disputes and claims.¹³

The 1215 ***Magna Carta***, became original source for British constitutionalism which represented then and now a social commitment to Rule of Law, as a promise that even the King was not above the law.¹⁴

Those who wrote our constitutions, both federal and state, were aware of the jurisprudential concepts, and indeed the language of ***Magna Carta*** and the Common Law.¹⁵

The English in the course of several civil wars continued to define their natural law Right to Petition and for unfettered access to the Courts.

The 1689 English Bill of Rights provided:

“That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal.” (Emphasis Added.)

Thus the 1689 English Bill of Rights explicitly ordained the unfettered right to access the Courts.¹⁶

¹³ “The Founders and the Classics”, Carl J. Richard, Harvard University Press, 1994; and, “*De Res Publica and De Legibus*”, Marcus Tullius Cicero, 54, Loeb Classical Library 1928, trans Clinton W. Keyes, 1928.

¹⁴ “The Roots of the Bill of Rights” Richard Schwartz, Chelsea House Publishers, 1980.

¹⁵ ***Id.***

¹⁶ ***Id.***

For the United States Constitution's drafters, no right was as fundamental to a free society as the unfettered access to the legal system, i.e., to be the beneficiary of a Rule of Law that protects one's rights against the most powerful.

If the Court system is inaccessible, all other natural rights are unable to exist and have meaning.

If the Court system fails to provide a fair and just hearing, as well as result, there is absolutely no Rule of Law.

Thirty-nine of our state constitutions, including the Texas Constitution, contain some form of the following language:¹⁷

"All courts shall be open; every person for injury done to his goods, lands, or person shall have remedy by due process or course of law; and right and justice shall be administered without self denial or delay."

These remedy clauses are directly traceable to ***Magna Carta***.

People assumed these fundamental rights were fundamental natural rights, although neither the Constitution nor the Bill of Rights explicitly state them.

One of the purposes for the Ninth Amendment¹⁸ was to be certain that this doctrine, which was so self-evident that it was omitted and thus not enumerated, clearly had to be defined as part of our fundamental constitutional heritage.

Thus, the Ninth Amendment's intent was to include these undeniably basic, common law values by a specific Constitutional clause, protecting unstated individual rights.

¹⁷ ***Id.***

¹⁸ "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

In reviewing constitutional law, from the earliest days of this Republic, the values and principles of access to justice are present.

Early precedent consistently defines that right as fundamental, although headnote description often defines access to the Courts as “*due process of law*”, sometimes classifying it as a “*privilege and immunity*” or terming its denial as a “*violation of equal protection of the law*”.

Otherwise jurists and scholars categorize the natural right of access to the Courts itself as a portion of the natural right to petition the government for a redress of grievances.

The Declaration of Independence spoke of all men being created equal and possessing rights that were inalienable.

When the framers wrote the United States Constitution, they insisted upon separation and limitation of powers and recognized that some values were so fundamental that the individual requires protection from the executive, the legislature, and even the courts; certainly, from a transient majority. The founders created a written constitution with a bill of rights and a recognition that some rights were fundamental. The framers believed that there had to be limitation of the powerful whether by royalty, wealth or privilege. These were values of such permanence, entitled to such respect, that the public interest was to have priority over any claims of privilege.¹⁹

In 1776, the Declaration of Independence cited King George's perceived failure to redress the grievances listed in colonial petitions, such as the 1775 Olive Branch Petition, as a justification to declare independence:

¹⁹ *Id.*

“...In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.”²⁰

The First Amendment Freedom to Petition

The First Amendment freedom to petition as the Supreme Court interprets is the supreme law of the land and so binds all Texas Courts under the Supremacy Clause.^{21 22}

The Supremacy Clause states: “*This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.*”²³

There are no Supreme Court cases permitting restriction of the First Amendment freedom to petition.

In ***Thomas v. Collins***²⁴ the Supreme Court struck down restrictions and declared that clear public interest must justify any attempt to restrict First Amendment liberties, where clear and present danger threatens, not doubtfully or remotely.

The Vexatious Litigant Statutes do not state what public interest if any, is threatened, nor do they describe any clear and present danger justifying their enactment.

In no less than eight (8) civil cases over the last hundred and twelve (112) years the Supreme Court has repeatedly protected and enforced the core First Amendment freedom to petition and access the Courts.

²⁰Quote from the *Declaration of Independence*.

²¹***Armstrong, v. Exceptional Child Center, Inc., Et Al***, 135 S.Ct. 1378, (2015).

²²***DirectTV, Inc., v. Amy Imburgia*** 136 S.Ct. 463, (2015).

²³U.S. Const., Art.VI

²⁴***Thomas v. Collins***, 323 U.S. 516, 530 (1945).

The cases of ***Chambers v. Baltimore***²⁵, ***Thomas v. Collins***,²⁶ ***Mine Workers v. Illinois Bar Assn.***,²⁷ ***California Motor Transport v. Trucking Unlimited***,²⁸ ***Bill Johnson's Restaurants, Inc. v. NLRB***,²⁹ ***McDonald v. Smith***³⁰, ***BE&K Construction Company v. NLRB***,³¹ and ***Borough of Duryea, Pennsylvania v. Guarnieri***,³² define the history of the Supreme Court's interpretation of the petition clause and are discussed below, along with relevant 5th Circuit Court of Appeals cases in chronological order.

The Court in 1907 said in ***Chambers v. Baltimore***³³:

"In the decision of the merits of the case there are some fundamental principles which are of controlling effect. The right to sue and defend in the courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the federal Constitution."

In 1945 in ***Thomas v. Collins***³⁴:

"The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now, as always, delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable, democratic freedoms secured by the First Amendment.³⁵ That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard

²⁵***Chambers v. Baltimore and Ohio Railroad Company*** 207 U.S. 142, (1907).

²⁶***Thomas v. Collins***, *supra*;

²⁷***Mine Workers v. Illinois Bar Assn.***, 389 U.S. 217, (US 1967).

²⁸***California Motor Transport v. Trucking Unlimited***, 404 U.S. 508 (1972).

²⁹***Bill Johnson's Restaurants, Inc. v. NLRB***, 461 U.S. 731, (1983).

³⁰***McDonald v. Smith*** 472 U.S. 479, (1985)

³¹***BE&K Construction Company v. NLRB***, 536 U.S. 516, (2002).

³²***Borough of Duryea, Pennsylvania V. Guarnieri***, 564 U.S. 379, (2011).

³³ ***Chambers v. Baltimore*** *supra*.

³⁴ ***Thomas v. Collins***, *supra*;

³⁵ ***Schneider v. State***, 308 U.S. 147; ***Cantwell v. Connecticut***, 310 U.S. 296; ***Prince v. Massachusetts***, 321 U.S. 158.

governs the choice.³⁶ For these reasons, any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which, in other contexts, might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights,³⁷ and therefore are united in the First Article's assurance."

In 1967 in ***Mine Workers v. Illinois Bar Assn.***³⁸:

"We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press. "All these, though not identical, are inseparable."³⁹ The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do, in fact, provide a helpful means of dealing with such an evil.⁴⁰ . . . Thus, in *Button, supra*, we dealt with a plan under which the NAACP not only advised prospective litigants to seek the assistance of particular attorneys but in many instances actually paid the attorneys itself. We held the dangers of baseless litigation and conflicting interests between the association and individual litigants far too speculative to justify the broad remedy invoked by the State, a remedy that would have seriously crippled the efforts of the NAACP to vindicate the rights of its members in court. . . Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or

³⁶ ***Compare United States v. Carolene Products Co.***, 304 U.S. 144, 152-153.

³⁷ ***De Jones v. Oregon***, 299 U.S. 353, 364

³⁸ ***Mine Workers*** *supra*.

³⁹ ***Thomas v. Collins***, *supra*. See ***De Jones v. Oregon***, 299 U.S. 353, 364 (1937).

⁴⁰ *Schneider v. State*, 308 U.S. 147 (1939); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

political ones. And the rights of free speech and a free press are not confined to any field of human interest.”

In 1972 in **California Motor Transport**⁴¹ the Court clarified that "*The right of petition is one of the freedoms protected by the Bill of Rights ... The right of access to the courts is indeed but one aspect of the right of petition.*"⁴²

In 1983 in **Ryland v. Shapiro**⁴³ the 5th Circuit recognized that:

“The Substantive Right of Access to Courts: The right of access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution. . . . ‘It is by now well established that access to the courts is protected by the First Amendment right to petition for redress of grievances.’ . . . A number of other courts have also recognized that this right of access is encompassed by the first amendment right to petition. . . . A third constitutional basis for the right of access to the courts is found in the due process clause. . . . Interference with the right of access to the courts gives rise to a claim for relief under section 1983. . . . In conclusion, it is clear that, under our Constitution, the right of access to the courts is guaranteed and protected from unlawful interference and deprivations by the state, and only compelling state interests will justify such intrusions.”

In 1983 in **Bill Johnson's Restaurants, Inc. v. NLRB**,⁴⁴ the Court said that the First Amendment protected a citizen's right to file an unmeritorious lawsuit:

“There are weighty countervailing considerations, however, that militate against allowing the Board to condemn the filing of a suit as an unfair labor practice and to enjoin its prosecution. In *California Motor Transport Co. v. Trucking Unlimited*,⁴⁵ we recognized that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances. Accordingly, we construed the antitrust laws as not prohibiting the filing of a lawsuit, regardless of the plaintiff's anticompetitive intent or purpose in doing so, unless the suit was a ‘mere sham’ filed for harassment purposes.⁴⁶ We should be sensitive to these First Amendment values in construing the NLRA in the present context. As the Board itself has recognized, ‘going to a judicial body for redress of alleged wrongs ... stands apart from other forms of action directed at the

⁴¹**California Motor Transport** *supra*.

⁴²**Johnson v. Avery**, 393 U.S. 483, 485; **Ex parte Hull**, 312 U.S. 546, 549.

⁴³**Ryland v. Shapiro** 708 F.2d 967, 971 (5th Cir. 1983).

⁴⁴**Bill Johnson's Restaurants, Inc. v. NLRB**, 461 U.S. 731, 741 (1983).

⁴⁵**California Motor Transport** *supra*.

⁴⁶*Id.* at 511, 92 S.Ct., at 612.

alleged wrongdoer. The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in court is to enjoin employees from exercising a protected right. In *Linn, supra*, we held that an employer can properly recover damages in a tort action arising out of a labor dispute if it can prove malice and actual injury. If the Board is allowed to enjoin the prosecution of a well-grounded state lawsuit, it necessarily follows that any state plaintiff subject to such an injunction will be totally deprived of a remedy for an actual injury, since the 'Board can award no damages, impose no penalty, or give any other relief' to the plaintiff. . . . Considering the First Amendment right of access to the courts and the State interests identified in cases such as *Linn* and *Farmer*, however, we conclude that the Board's interpretation of the Act is untenable. The filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act."

And again in 1985 in ***McDonald v. Smith***⁴⁷:

"The First Amendment guarantees "the right of the people. . . to petition the Government for a redress of grievances." The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression. In *United States v. Cruikshank*, 92 U.S. 542 (1876), the Court declared that this right is implicit in "[t]he very idea of government, republican in form." *Id.* at 552. . . . To accept Petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble.⁴⁸ These First Amendment rights are inseparable."⁴⁹

In 1986 in ***Jackson v. Procnier***⁵⁰ the 5th Circuit expressly recognized that the denial of a litigant's freedom of access to the Courts to pursue a civil appeal as the Statutes restrict, constitutes the deprivation of a substantive constitutional freedom, which the First Amendment protects, as well as, constitutes a potential deprivation of substantive and procedural due process:

"A substantive right of access to the courts has long been recognized. In *Ryland v. Shapiro*, we characterized that right as 'one of the fundamental rights protected by the Constitution.' In *Wilson v. Thompson*, we stated, 'it is by now well established that

⁴⁷***McDonald v. Smith*** 472 U.S. 479, 482 (1985)

⁴⁸See *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 222 (1967).

⁴⁹*Thomas v. Collins*, 323 U.S. 516, 530 (1945).

⁵⁰***Jackson v. Procnier***, 789 F.2d 307, 310 (5th Cir. 1986)

access to the courts is protected by the First Amendment right to petition for redress of grievances.’ That right has also been found in the fourteenth amendment guarantees of procedural and substantive due process. Consequently, interference with access to the courts may constitute the deprivation of a substantive constitutional right, as well as a potential deprivation of property without due process, and may give rise to a claim for relief under Sec. 1983. Any deliberate impediment to access, even a delay of access, may constitute a constitutional deprivation. . . . Recognition of the constitutional right of access to the courts, however, long precedes *Bounds*, and has from its inception been applied to civil as well as constitutional claims. . . . If Jackson has alleged a deliberate denial of his right of access to the courts to pursue his civil appeal, he has alleged the deprivation of a substantive constitutional right found in the first amendment, as well as a potential deprivation of substantive and procedural due process.”

In 1989 in **Crowder v. Sinyard**,⁵¹ the 5th Circuit declared “As we have pointed out, however, our cases also stand for the proposition that [a] mere formal right of access to the courts does not pass constitutional muster. Courts have required that the access be 'adequate, effective, and meaningful.’”

In 2002 in **BE&K Construction Company v. NLRB**,⁵² this Court held that the First Amendment freedom to petition protected a citizen’s right to file a baseless lawsuit:

“The First Amendment provides, in relevant part, that ‘Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.’ We have recognized this right to petition as one of ‘the most precious of the liberties safeguarded by the Bill of Rights,’⁵³ and have explained that the right is implied by ‘[t]he very idea of a government, republican in form.’⁵⁴ . . . We said in *Bill Johnson’s* that the Board could enjoin baseless retaliatory suits because they fell outside of the First Amendment and thus were analogous to ‘false statements.’⁵⁵ We concluded that ‘[j]ust as false statements are not immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition.’⁵⁶ While this analogy is helpful, it does not suggest that the class of baseless litigation is *completely* unprotected: at most, it indicates such litigation should be unprotected ‘just as’ false statements are. And while false statements may be

⁵¹**Crowder v. Sinyard**, 884 F.2d 804, 811 (5th Cir. 1989).

⁵²**BE&K Construction Company v NLRB**, *supra*.

⁵³**Mine Workers** *supra*.

⁵⁴**United States v. Cruikshank**, 92 U.S. 542, 552 (US 1876).

⁵⁵**Bill Johnson’s**, *supra*, and, **Mine Workers** *supra*.

⁵⁶**Ibid.** (citations omitted).

unprotected for their own sake, '[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.'⁵⁷ An example of such 'breathing space' protection is the requirement that a public official seeking compensatory damages for defamation prove by clear and convincing evidence that false statements were made with knowledge or reckless disregard of their falsity.⁵⁸ . . . It is at least consistent with these 'breathing space' principles that we have never held that the entire class of objectively baseless litigation may be enjoined or declared unlawful even though such suits may advance no First Amendment interests of their own. Instead, in cases like *Bill Johnson's* and *Professional Real Estate Investors*, our holdings limited regulation to suits that were both objectively baseless *and* subjectively motivated by an unlawful purpose. But we need not resolve whether objectively baseless litigation requires any 'breathing room' protection, for what is at issue here are suits that are not baseless in the first place. Instead, as an initial matter, we are dealing with the class of reasonably based but unsuccessful lawsuits. But whether this class of suits falls outside the scope of the First Amendment's Petition Clause at the least presents a difficult constitutional question, given the following considerations.

First, even though all the lawsuits in this class are unsuccessful, the class nevertheless includes a substantial proportion of all suits involving genuine grievances because the genuineness of a grievance does not turn on whether it succeeds. Indeed, this is reflected by our prior cases which have protected petitioning whenever it is genuine, not simply when it triumphs.⁵⁹ Nor does the text of the First Amendment speak in terms of successful petitioning—it speaks simply of 'the right of the people . . . to petition the Government for a redress of grievances.' Second, even unsuccessful but reasonably based suits advance some First Amendment interests. Like successful suits, unsuccessful suits allow the 'public airing of disputed facts,'⁶⁰ and raise matters of public concern. They also promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around. Moreover, the ability to lawfully prosecute even unsuccessful suits adds legitimacy to the court system as a designated alternative to force.⁶¹

Finally, while baseless suits can be seen as analogous to false statements, that analogy does not directly extend to suits that are unsuccessful but reasonably based. For even if a suit could be seen as a kind of provable statement, the fact that it loses does not

⁵⁷*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (emphasis added); *id.*, at 342 (noting the need to protect some falsehoods to ensure that 'the freedoms of speech and press [receive] that 'breathing space' essential to their fruitful exercise' (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963))).

⁵⁸See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–280, 285 (1964).

⁵⁹See, e.g., *Professional Real Estate Investors*, 508 U.S., at 58–61 (protecting suits from antitrust liability whenever they are objectively or subjectively genuine); *Pennington*, 381 U.S., at 670 (shielding from antitrust immunity any "concerted effort to influence public officials").

⁶⁰*Bill Johnson's*, *supra*, at 743.

⁶¹See Andrews, A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right, 60 Ohio St. L. J. 557, 656 (1999) (noting the potential for avoiding violence by the filing of unsuccessful claims).

mean it is false. At most it means the plaintiff did not meet its burden of proving its truth. That does not mean the defendant has proved—or could prove—the contrary.”

And in 2011 in *Borough of Duryea, Pennsylvania v. Guarnieri*,⁶²:

“This Court has said that the right to speak and the right to petition are cognate rights.” . . . “This Court's precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes.” . . . “The right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government.”⁶³

The Vexatious Litigant Statutes are Unconstitutional

The Texas Vexatious Litigant statutes are unconstitutional because they chill core freedoms and are thus repugnant to the First and Fourteenth Amendments.

They also violate express privileges and immunities guaranteed under the Texas Constitution Art. I, §§ 13, 19, 27, and 29, discussed below.

There are no stated conditions or limitations upon the peaceable exercise of the freedom to petition or to access open courts under either the Texas or United States Constitutions.

The Supreme Court has declared the First Amendment core freedom to petition to be a cognate right to the freedom of speech, yet the State of Texas—through enactment of the statutes—have declared forfeited these federally protected constitutional rights.⁶⁴

⁶²*Borough of Duryea, supra*.

⁶³*Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896-897, (1984); see also *BE& K Constr. Co. v. NLRB*, 536 U.S. 516, 525, (2002); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741, (1983); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513, (1972).

⁶⁴*Leonard v. Abbott*, 171 S.W.3d 451, 456-58 (Tex. App. Dist. 3—Austin 2005, pet. denied) (holding that the statute is not unconstitutional because it strikes a balance between Texans' right of access to their courts and the public interest in protecting defendants from those who abuse the Texas court system by systematically filing lawsuits with little or no merit); *Cooper v. McNulty*, 2016 Tex. App. LEXIS 11333, *11, 2016 WL 6093999 (Tex. App. Dist. 5—Dallas 2016, no pet.); *Retzlaff v. GoAmerica Communs. Corp.*, 356 S.W.3d 689, 702 (Tex. App. Dist. 8—El Paso 2011, no pet.); *Sweed v. Nye*, 319 S.W.3d 791, 793 (Tex. App. Dist. 8—El Paso 2010, pet. denied); *Dolenz v. Boundy*, No. 05-08-01052-CV, 2009 LEXIS 9196, *9, 2009 WL 4283106 (Tex. App. Dist. 5—Dallas 2009, no pet.); *In re Potts*, 357 S.W.3d 766, 769 (Tex. App. Dist. 14—Houston 2011, orig. proceeding); *Johnson v. Sloan*, 320 S.W.3d 388, 389-90 (Tex. App. Dist. 8 —El Paso 2010, pet. denied);

All of the Texas Courts of Appeals referenced herein that have addressed the constitutionality of the statutes have determined—with virtually no reasoning—that the statutes are not unconstitutional on their face; that the statutes do not authorize courts to act arbitrarily; that it only permits courts to restrict a citizens’ access to the courts after making specific findings of vexatiousness; and that the restrictions are not unreasonable or arbitrary when **balanced** against the purpose and basis of the statute.⁶⁵

However, the Texas Courts of Appeals’ collective and nearly identical reasoning does not address the First Amendment constitutional mandate that “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances” or the Fourteenth Amendment constitutional mandate that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”.

Nor do they address the specific freedoms guaranteed under the Texas Constitution Art. I, § 27 Right of Petition for Redress of Grievances:

“The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance.”

Clifton v. Walters, 308 S.W.3d 94, 101-02 (Tex. App. Dist. 2—Fort Worth 2010, pet. denied); *In re Johnson*, No. 07-07-0245-CV, 2008 Tex. App. LEXIS 5110, 2008 WL 2681314, at *2 (Tex. App. Dist. 7—Amarillo 2008) (orig. proceeding).

⁶⁵The Texas appellate courts, which recite nearly identical and conclusory reasoning as to why the statute is *not* unconstitutional, do not explain, for example, how the criteria of five losses in seven years satisfies the prior restraint on a citizen’s access to the Courts. Civ. Prac. & Rem. Code 11.054. Nor do the Texas Courts of Appeal attempt to reconcile any other criterion with a *pro se* litigant’s right to petition and the open courts’ provisions. *Leonard v. Abbott*, 171 S.W.3d at 457 (“To establish an open courts violation, it must be shown that the litigant has a cognizable common law cause of action being restricted by a statute, and that the restriction is unreasonable or arbitrary when balanced against the purpose of the statute.”). While the Third Court of Appeals recites a proper standard in *Leonard*, it does not fulfill its requirement with articulated reasoning.

The statutes also violate the Texas Constitutional guarantees to open courts, with remedy by due course of law. Tex. Const. Art. 1 § 13:

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. **All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.**”

The statutes disfranchise Appellant and other U.S. citizens of privileges and immunities expressly prohibited under Tex. Const. Art 1. § 19:

“**No citizen** of this State **shall be deprived of** life, liberty, property, **privileges or immunities, or in any manner disfranchised**, except by the due course of the law of the land.”

In this case the due course of the law of the land is the First and Fourteenth Amendments to the United States Constitution and the Texas Constitution Article 1. §§ 13,19, 27 and 29.

The First Amendment mandates “Congress shall make no law” and the Texas Constitution Article I, § 29 declares all laws contrary to this “Bill of Rights”, shall be void:

“To guard against transgressions of the high powers herein delegated, we declare that everything in this ‘Bill of Rights’ is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void.”

Likewise, 14th Amendment provides:

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

This Court in **Leonard v. Abbott** as well as other Appellate Courts have erroneously utilized as substantive constitutional analysis of these statutes a “weighing” or “balancing” analysis in order to conclude they meet Texas Constitutional muster.

However, as the Supreme Court said in ***Brown v. Entertainment Merchants Association***⁶⁶ the First Amendment and the freedoms it guarantees are not subject to a weighing or balancing analysis.

These failures deprive all Texas citizens equal protection of core First and Fourteenth Amendment guaranteed privileges and immunities.

Under express constitutional mandates, the statutes must be declared void because they place onerous restrictions on unfettered constitutional freedoms.

The Texas Courts have never enforced these constitutional mandates in any case challenging the Vexatious Litigant Statutes.

The Supremacy Clause places an affirmative duty on all Texas Courts to preserve, protect and defend these First and Fourteenth Amendment freedoms, which as interpreted by the Supreme Court is the supreme law of the land.⁶⁷

The Supremacy Clause so binds all Texas Courts with an affirmative duty to review when challenged the constitutionality of the statutes, which all Texas Courts have refused to do.

No state or federal case permits state laws to supersede First Amendment freedoms or the Texas Constitution's Bill of Rights.

This Court should declare that the statutes violate both the United States and Texas Constitutions and are therefore void *ab initio*.

⁶⁶***Brown v. Entertainment Merchants Association***, 564 U.S. 786 (2011).

⁶⁷See *Armstrong, v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1383-84 (2015) (supremacy clause requires courts to invalidate state laws that conflict with federal laws).

The Statutes, arbitrarily limit the freedom to petition to five (5) unsuccessful lawsuits within seven (7) years, then allows for the imposition of a permanent injunction prohibiting *pro se* litigation, requiring pre-filing governmental approval to access the Courts, punishable by contempt.⁶⁸

The statutes also provide that if the plaintiff relitigates or attempts to relitigate, *pro se*, any of the issues of fact or law, he or she is subject to being declared a vexatious litigant for filing one pleading, and all constitutional rights to petition are forfeited.

The statutes do not prohibit the same behavior if represented by counsel.

Hence, the statutes permit what should be a collateral estoppel defensive argument to be transformed into a judicial declaration forfeiting a citizens' First Amendment freedom to petition and access Texas courts.

These statutes chill if not freeze core freedoms guaranteed by the United States and Texas Constitutions—because they impose multiple onerous limitations on a citizen's freedom to petition—which is not found in either constitution, and should be void under Tex. Const. art. I, § 29 rights shall remain inviolate.

The statutes are a prior restraint on the exercise of core First Amendment freedoms and are presumptively unconstitutional under both Texas and Federal law.^{69 70}

The Supreme Court held in 2010 in ***Citizens United v. FEC***⁷¹ that prior restraint on the freedom of speech is facially unconstitutional and must be invalidated:

⁶⁸(App.31a).

⁶⁹***Davenport v. Garcia***, 834 S.W.2d 4, 10 (Tex. 1992). (holding that a prior restraint of First Amendment freedoms is presumptively unconstitutional under the Texas Constitution;

⁷⁰***Citizens United v. FEC***, 558 U.S. 310, (US 2010);

⁷¹***Citizens United supra***; ***Nebraska Press Ass'n v. Stuart***, 427 U.S. 539, 563-64, (1976),

"The regulatory scheme at issue may not be a prior restraint in the strict sense. ... The restrictions thus function as the equivalent of a prior restraint, giving the FEC power analogous to the type of government practices that the First Amendment was drawn to prohibit. The ongoing chill on speech makes it necessary to invoke the earlier precedents that a statute that chills speech can and **must be invalidated where its facial invalidity has been demonstrated**. . . .Laws burdening such speech are subject to strict scrutiny, which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest."

The Texas Supreme Court echoed this principle in ***Davenport v. Garcia***⁷²:

The presumption in all cases under section eight (freedom of speech) is that pre-speech sanctions or "prior restraints" are unconstitutional.⁷³ . . .This court previously indicated that a prior restraint would be permissible only when essential to the avoidance of an impending danger.⁷⁴ . . . Since the dimensions of our constitutionally guaranteed liberties are continually evolving, today we build on our prior decisions by affirming that a prior restraint on expression is presumptively unconstitutional. With this concept in mind, we adopt the following test: a gag order in civil judicial proceedings will withstand constitutional scrutiny only where there are specific findings supported by evidence that (1) an imminent and irreparable harm to the judicial process will deprive litigants of a just resolution of their dispute, and (2) the judicial action represents the least restrictive means to prevent that harm. Assisting our analysis are federal cases that have addressed prior restraints. The standard enunciated in *Nebraska Press Ass'n v. Stuart*,⁷⁵ does not, however, sufficiently protect the rights of free expression that we believe that the fundamental law of our state secures. Today we adopt a test recognizing that article one, section eight of the Texas Constitution provides greater rights of free expression than its federal equivalent. . . .We are fully aware that a prior restraint will withstand scrutiny under this test only under the most extraordinary circumstances. That result is consistent with the mandate of our constitution recognizing our broad right to freedom of expression in Texas. An individual's rights under the state constitution do not end at the courthouse door; rather, the courthouse is properly the fortress of those rights."

⁷²***Davenport v. Garcia*** *supra*.

⁷³*Ex Parte Price*, 741 S.W.2d 366, 369 (Tex.1987) (Gonzalez, J., concurring) ("Prior restraints ... are subject to judicial scrutiny with a heavy presumption against their constitutional validity.")

⁷⁴*Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 255 (Tex.1983) (striking down an injunction because the language at issue "evoked no threat of danger to anyone and, therefore, may not be subject to the prior restraint of a temporary injunction."). See also *Dallas General Drivers, Warehousemen and Helpers v. Wamix, Inc. of Dallas*, 156 Tex. 408, 295 S.W.2d 873, 879 (1956); *Ex Parte Tucker*, 220 S.W. at 76 (speech is properly restrained only when involving an actionable and immediate threat); *Pirmantgen v. Feminelli*, 745 S.W.2d 576, 579 (Tex.App.--Corpus Christi 1988, no writ) (restriction against disseminating an allegedly libelous letter was an unconstitutional prior restraint).

⁷⁵***Nebraska Press***, *supra*.

It might be helpful to hypothetically apply the cognate guaranteed freedoms of speech and petition to a fictional Texas statute that forbids prospective speech after a trial court finds that a citizen has made five (5) slanderous public statements within seven (7) years, and in so finding, enjoins the citizen from speaking, without first getting court approval and posting security—and, if the citizen speaks without first getting court approval and posting security, he or she is subject to contempt.⁷⁶

Any such statute, which is arguably 100% analogous to the Vexatious Litigant Statutes, would be struck down at its first instance as a prior restraint on the freedom of speech.

Yet all Texas courts have refused to preserve, protect, and defend the core First Amendment freedom to petition in regard to these Statutes.

The Vexatious Litigant Statutes constitute a prior restraint of core constitutional freedoms, thus are repugnant to the First and Fourteenth Amendments.⁷⁷

Also, indicative of the statute's unconstitutionality, is that neither the Texas Courts of Appeals nor the statute itself identifies any public interest threatened, or any clear and present danger posed by allowing citizens to appear *pro se* in civil matters.

The statute is unconstitutional precisely for this reason.

The Supreme Court has required that any attempt to restrict First Amendment liberties must be justified by clear public interest, threatened by clear and present danger.

The statute is silent on these elements, and the Texas Courts of Appeals cases upholding its constitutionality are uniformly silent on these constitutional requirements.

⁷⁶See Tex. Civ. Prac. & Rem. Code § 11.101(b)

⁷⁷See ***Citizens United v. FEC*** *supra*.

Indeed, all Texas Courts of Appeal construing the statute and finding the provisions valid, do not identify any clear and present danger, nor do they address the vexatious litigant statute's chilling effect on a citizen's First Amendment freedom to access the courts *pro se*.

Further, the bare-bones reasoning of the Texas Courts of Appeals is arbitrary and capricious and violates Petitioner's Fourteenth Amendment right to equal protection of First Amendment privileges and immunities.

The freedom to represent oneself, as a *pro se* litigant in a civil case, is a codified legal right in federal courts.⁷⁸

Texas follows with Texas Rule of Civil Procedure 7, which provides: "Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court."

These fundamental rights are not protected by the statute—but instead, are extinguished by the statute.

The statute sets out extremely onerous conditions for exercising the freedom to petition, which in many cases, completely terminates a citizens' right to access Texas courts.⁷⁹

The case of ***Mine Workers*** further supports review of the statute. In it, the Court opined that, regarding a state law that limited speech, assembly and petition, "[w]e have ... repeatedly

⁷⁸28 U.S.C §1654 (2012) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.").

⁷⁹See e.g., ***Bill Johnson's Rests. v. NLRB***, 461 U.S. at 741 (the First Amendment protects a citizen's right to file a lawsuit and lose); ***BE&K Construction Company v. NLRB***, 536 U.S. 516, 524 (2002) (the First Amendment protects a citizen's right to file unsuccessful lawsuits because the genuineness of a grievance does not turn on whether it succeeds); ***In Mine Workers v. Illinois Bar Assn.***, 389 U.S. 217, 222 (1967) ("The First Amendment would ... be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such.").

held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do, in fact, provide a helpful means of dealing with such an evil."

In applying this controlling precedent, the State of Texas may not curtail only *pro se* litigation, especially arbitrarily, as it has with the vexatious litigant statutes.

The statutes do not accommodate the foregoing constitutional protections, and none of the Texas cases finding it valid, expound on the "danger" of *pro se* litigation or why that "danger" should be restricted.

Similarly, no "rational connection between the remedy provided and the evil to be curbed" is explained in any of the court of appeals' decisions or within the statute.⁸⁰

Clearly the statute is unconstitutional, and this Court should so declare.

CONCLUSION

The Vexatious Litigant Statutes completely fetter Appellant and exclude her from any access to the rule of law.

"Equal Justice Under Law" is not just a saying. It is the supreme law of the land. These words are the bedrock of the American legal system.

The statutes are repugnant to core First Amendment freedoms and must be invalidated.

This Honorable Court should remedy this constitutional injustice.

⁸⁰See *Mine Workers*, 389 U.S. at 222 (statutory limitations on First Amendment rights "must have clear support in public danger, actual or impending" and "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation").

PRAYER

WHEREFORE PREMISES CONSIDERED, Amicus Curiae prays that this Court render judgment declaring the vexatious litigant statutes unconstitutional, and for such other relief to which Appellant might be entitled at law or in equity, as this Court deems just and proper.

Respectfully submitted,
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing instrument has been e-filed and e-served upon the following on 27 March 2020, at the following address:

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Certificate of Compliance with T.R.A.P .9.4,

Pursuant to Texas Rule of Appellate Procedure 9.4, this is to certify that this document complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4 because the Amicus Curiae Brief is computer-generated and does not exceed Appellants' allotted 27000 words. Using the word-count feature of Word, the undersigned certifies that this document contains 7774 words from the salutation to the signature block. This document also complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a proportionally spaced typeface using Word in 14-point Arial Narrow footnotes 12 point Arial Narrow.

/s/ Donald T. Cheatham

§ 11.001. Definitions.

Texas Statutes

Civil Practice and Remedies Code

Title 2. Trial, Judgment, And Appeal

Subtitle A. General Provisions

Chapter 11. Vexatious Litigants

Subchapter A. General Provisions

Current through 2017 Special Session

§ 11.001. Definitions

In this chapter:

- (1) "Defendant" means a person or governmental entity against whom a plaintiff commences or maintains or seeks to commence or maintain a litigation.
- (2) "Litigation" means a civil action commenced, maintained, or pending in any state or federal court.
- (3) [Repealed by 2013 amendment.]
- (4) "Moving defendant" means a defendant who moves for an order under Section 11.051 determining that a plaintiff is a vexatious litigant and requesting security.
- (5) "Plaintiff" means an individual who commences or maintains a litigation pro se.

Cite as Tex. Civ. Prac. and Rem. Code § 11.001

History. Amended by Acts 2013, 83rd Leg. - Regular Session, ch. 1224, Sec. 10, eff. 9/1/2013.

Amended by Acts 2013, 83rd Leg. - Regular Session, ch. 1224, Sec. 1, eff. 9/1/2013.

Amended by Acts 2011, 82nd Leg., 1st C.S., Ch. 3, Sec. 9.01, eff. January 1, 2012.

§ 11.002. Applicability.

Texas Statutes

Civil Practice and Remedies Code

Title 2. Trial, Judgment, And Appeal

Subtitle A. General Provisions

Chapter 11. Vexatious Litigants

Subchapter A. General Provisions

Current through 2017 Special Session

§ 11.002. Applicability

- (a) This chapter does not apply to an attorney licensed to practice law in this state unless the attorney proceeds pro se.
- (b) This chapter does not apply to a municipal court.

Cite as Tex. Civ. Prac. and Rem. Code § 11.002

History. Added by Acts 2013, 83rd Leg. - Regular Session, ch. 1224, Sec. 2, eff. 9/1/2013.

§ 11.051. Motion For Order Determining Plaintiff A Vexatious Litigant And Requesting Security.

Texas Statutes

Civil Practice and Remedies Code

Title 2. Trial, Judgment, And Appeal

Subtitle A. General Provisions

Chapter 11. Vexatious Litigants

Subchapter B. Vexatious Litigants

Current through 2017 Special Session

§ 11.051. Motion For Order Determining Plaintiff A Vexatious Litigant And Requesting Security

In a litigation in this state, the defendant may, on or before the 90th day after the date the defendant files the original answer or makes a special appearance, move the court for an order:

- (1) determining that the plaintiff is a vexatious litigant; and
- (2) requiring the plaintiff to furnish security.

Cite as Tex. Civ. Prac. and Rem. Code § 11.051

History. Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

§ 11.052. Stay Of Proceedings On Filing Of Motion.

Texas Statutes

Civil Practice and Remedies Code

Title 2. Trial, Judgment, And Appeal

Subtitle A. General Provisions

Chapter 11. Vexatious Litigants

Subchapter B. Vexatious Litigants

Current through 2017 Special Session

§ 11.052. Stay Of Proceedings On Filing Of Motion

- (a) On the filing of a motion under Section 11.051, the litigation is stayed and the moving defendant is not required to plead:
 - (1) if the motion is denied, before the 10th day after the date it is denied; or
 - (2) if the motion is granted, before the 10th day after the date the moving defendant receives written notice that the plaintiff has furnished the required security.
- (b) On the filing of a motion under Section 11.051 on or after the date the trial starts, the litigation is stayed for a period the court determines.

Cite as Tex. Civ. Prac. and Rem. Code § 11.052

History. Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

§ 11.053. Hearing.

Texas Statutes

Civil Practice and Remedies Code

Title 2. Trial, Judgment, And Appeal

Subtitle A. General Provisions

Chapter 11. Vexatious Litigants

Subchapter B. Vexatious Litigants

Current through 2017 Special Session

§ 11.053. Hearing

- (a) On receipt of a motion under Section 11.051, the court shall, after notice to all parties, conduct a hearing to determine whether to grant the motion.
- (b) The court may consider any evidence material to the ground of the motion, including:
 - (1) written or oral evidence; and
 - (2) evidence presented by witnesses or by affidavit.

Cite as Tex. Civ. Prac. and Rem. Code § 11.053

History. Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

§ 11.054. Criteria For Finding Plaintiff A Vexatious Litigant.

Texas Statutes

Civil Practice and Remedies Code

Title 2. Trial, Judgment, And Appeal

Subtitle A. General Provisions

Chapter 11. Vexatious Litigants

Subchapter B. Vexatious Litigants

Current through 2017 Special Session

§ 11.054. Criteria For Finding Plaintiff A Vexatious Litigant

A court may find a plaintiff a vexatious litigant if the defendant shows that there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant and that:

- (1) the plaintiff, in the seven-year period immediately preceding the date the defendant makes the motion under Section 11.051, has commenced, prosecuted, or maintained at least five litigations as a pro se litigant other than in a small claims court that have been:
 - (A) finally determined adversely to the plaintiff;
 - (B) permitted to remain pending at least two years without having been brought to trial or hearing; or
 - (C) determined by a trial or appellate court to be frivolous or groundless under state or federal laws or rules of procedure;
- (2) after a litigation has been finally determined against the plaintiff, the plaintiff repeatedly relitigates or attempts to relitigate, pro se , either:
 - (A) the validity of the determination against the same defendant as to whom the litigation was finally determined; or
 - (B) the cause of action, claim, controversy, or any of the issues of fact or law determined or concluded by the final determination against the same defendant as to whom the litigation was finally determined; or
- (3) the plaintiff has previously been declared to be a vexatious litigant by a state or federal court in an action or proceeding based on the same or substantially similar facts, transition, or occurrence.

Cite as Tex. Civ. Prac. and Rem. Code § 11.054

History. Amended by Acts 2013, 83rd Leg. - Regular Session, ch. 1224, Sec. 3, eff. 9/1/2013.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

§ 11.055. Security.

Texas Statutes

Civil Practice and Remedies Code

Title 2. Trial, Judgment, And Appeal

Subtitle A. General Provisions

Chapter 11. Vexatious Litigants

Subchapter B. Vexatious Litigants

Current through 2017 Special Session

§ 11.055. Security

- (a) A court shall order the plaintiff to furnish security for the benefit of the moving defendant if the court, after hearing the evidence on the motion, determines that the plaintiff is a vexatious litigant.
- (b) The court in its discretion shall determine the date by which the security must be furnished.
- (c) The court shall provide that the security is an undertaking by the plaintiff to assure payment to the moving defendant of the moving defendant's reasonable expenses incurred in or in connection with a litigation commenced, caused to be commenced, maintained, or caused to be maintained by the plaintiff, including costs and attorney's fees.

Cite as Tex. Civ. Prac. and Rem. Code § 11.055

History. Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

§ 11.056. Dismissal For Failure To Furnish Security.

Texas Statutes

Civil Practice and Remedies Code

Title 2. Trial, Judgment, And Appeal

Subtitle A. General Provisions

Chapter 11. Vexatious Litigants

Subchapter B. Vexatious Litigants

Current through 2017 Special Session

§ 11.056. Dismissal For Failure To Furnish Security

The court shall dismiss a litigation as to a moving defendant if a plaintiff ordered to furnish security does not furnish the security within the time set by the order.

Cite as Tex. Civ. Prac. and Rem. Code § 11.056

History. Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

§ 11.057. Dismissal On The Merits.

Texas Statutes

Civil Practice and Remedies Code

Title 2. Trial, Judgment, And Appeal

Subtitle A. General Provisions

Chapter 11. Vexatious Litigants

Subchapter B. Vexatious Litigants

Current through 2017 Special Session

§ 11.057. Dismissal On The Merits

If the litigation is dismissed on its merits, the moving defendant has recourse to the security furnished by the plaintiff in an amount determined by the court.

Cite as Tex. Civ. Prac. and Rem. Code § 11.057

History. Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

§ 11.101. Prefiling Order; Contempt.

Texas Statutes

Civil Practice and Remedies Code

Title 2. Trial, Judgment, And Appeal

Subtitle A. General Provisions

Chapter 11. Vexatious Litigants

Subchapter C. Prohibiting Filing Of New Litigation

Current through 2017 Special Session

§ 11.101. Prefiling Order; Contempt

- (a) A court may, on its own motion or the motion of any party, enter an order prohibiting a person from filing, pro se , a new litigation in a court to which the order applies under this section without permission of the appropriate local administrative judge described by Section 11.102(a) to file the litigation if the court finds, after notice and hearing as provided by Subchapter B, that the person is a vexatious litigant.
.
- (b) A person who disobeys an order under Subsection (a) is subject to contempt of court.
- (c) A litigant may appeal from a prefiling order entered under Subsection (a) designating the person a vexatious litigant.
- (d) A prefiling order entered under Subsection (a) by a justice or constitutional county court applies only to the court that entered the order.
- (e) A prefiling order entered under Subsection (a) by a district or statutory county court applies to each court in this state.

Cite as Tex. Civ. Prac. and Rem. Code § 11.101

History. Amended by Acts 2013, 83rd Leg. - Regular Session, ch. 1224, Sec. 4, eff. 9/1/2013.

Amended by Acts 2011, 82nd Leg., 1st C.S., Ch. 3, Sec. 9.02, eff. January 1, 2012.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

§ 11.102. Permission By Local Administrative Judge.

Texas Statutes

Civil Practice and Remedies Code

Title 2. Trial, Judgment, And Appeal

Subtitle A. General Provisions

Chapter 11. Vexatious Litigants

Subchapter C. Prohibiting Filing Of New Litigation

Current through 2017 Special Session

§ 11.102. Permission By Local Administrative Judge

- (a) A vexatious litigant subject to a prefiling order under Section 11.101 is prohibited from filing, pro se, new litigation in a court to which the order applies without seeking the permission of:
 - (1) the local administrative judge of the type of court in which the vexatious litigant intends to file, except as provided by Subdivision (2); or
 - (2) the local administrative district judge of the county in which the vexatious litigant intends to file if the litigant intends to file in a justice or constitutional county court.
- (b) A vexatious litigant subject to a prefiling order under Section 11.101 who files a request seeking permission to file a litigation shall provide a copy of the request to all defendants named in the proposed litigation.
- (c) The appropriate local administrative judge described by Subsection (a) may make a determination on the request with or without a hearing. If the judge determines that a hearing is necessary, the judge may require that the vexatious litigant filing a request under Subsection (b) provide notice of the hearing to all defendants named in the proposed litigation.
- (d) The appropriate local administrative judge described by Subsection (a) may grant permission to a vexatious litigant subject to a prefiling order under Section 11.101 to file a litigation only if it appears to the judge that the litigation:
 - (1) has merit; and
 - (2) has not been filed for the purposes of harassment or delay.

- (e) The appropriate local administrative judge described by Subsection (a) may condition permission on the furnishing of security for the benefit of the defendant as provided in Subchapter B.
- (f) A decision of the appropriate local administrative judge described by Subsection (a) denying a litigant permission to file a litigation under Subsection (d), or conditioning permission to file a litigation on the furnishing of security under Subsection (e) , is not grounds for appeal, except that the litigant may apply for a writ of mandamus with the

Cite as Tex. Civ. Prac. and Rem. Code § 11.102

History. Amended by Acts 2013, 83rd Leg. - Regular Session, ch. 1224, Sec. 5, eff. 9/1/2013.

Amended by Acts 2011, 82nd Leg., 1st C.S., Ch. 3, Sec. 9.03, eff. January 1, 2012.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

§ 11.103. Duties Of Clerk.

Texas Statutes

Civil Practice and Remedies Code

Title 2. Trial, Judgment, And Appeal

Subtitle A. General Provisions

Chapter 11. Vexatious Litigants

Subchapter C. Prohibiting Filing Of New Litigation

Current through 2017 Special Session

§ 11.103. Duties Of Clerk

- (a) Except as provided by Subsection (d), a clerk of a court may not file a litigation, original proceeding, appeal, or other claim presented, pro se, by a vexatious litigant subject to a prefiling order under Section 11.101 unless the litigant obtains an order from the appropriate local administrative judge described by Section 11.102(a) permitting the filing.
- (b) [Repealed by 2013 amendment.]
- (c) If the appropriate local administrative judge described by Section 11.102(a) issues an order permitting the filing of the litigation , the litigation remains stayed and the defendant need not plead until the 10th day after the date the defendant is served with a copy of the order.
- (d) A clerk of a court of appeals may file an appeal from a prefiling order entered under Section 11.101 designating a person a vexatious litigant or a timely filed writ of mandamus under Section 11.102 .

Cite as Tex. Civ. Prac. and Rem. Code § 11.103

History. Amended by Acts 2013, 83rd Leg. - Regular Session, ch. 1224, Sec. 10, eff. 9/1/2013.

Amended by Acts 2013, 83rd Leg. - Regular Session, ch. 1224, Sec. 7, eff. 9/1/2013.

Amended by Acts 2013, 83rd Leg. - Regular Session, ch. 1224, Sec. 6, eff. 9/1/2013.

Amended by Acts 2011, 82nd Leg., 1st C.S., Ch. 3, Sec. 9.04, eff. January 1, 2012.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

§ 11.1035. Mistaken Filing.

Texas Statutes

Civil Practice and Remedies Code

Title 2. Trial, Judgment, And Appeal

Subtitle A. General Provisions

Chapter 11. Vexatious Litigants

Subchapter C. Prohibiting Filing Of New Litigation

Current through 2017 Special Session

§ 11.1035. Mistaken Filing

- (a) If the clerk mistakenly files litigation presented, pro se, by a vexatious litigant subject to a prefiling order under Section 11.101 without an order from the appropriate local administrative judge described by Section 11.102(a), any party may file with the clerk and serve on the plaintiff and the other parties to the litigation a notice stating that the plaintiff is a vexatious litigant required to obtain permission under Section 11.102 to file litigation.
- (b) Not later than the next business day after the date the clerk receives notice that a vexatious litigant subject to a prefiling order under Section 11.101 has filed, pro se, litigation without obtaining an order from the appropriate local administrative judge described by Section 11.102(a), the clerk shall notify the court that the litigation was mistakenly filed. On receiving notice from the clerk, the court shall immediately stay the litigation and shall dismiss the litigation unless the plaintiff, not later than the 10th day after the date the notice is filed, obtains an order from the appropriate local administrative judge described by Section 11.102(a) permitting the filing of the litigation.
- (c) An order dismissing litigation that was mistakenly filed by a clerk may not be appealed.

Cite as Tex. Civ. Prac. and Rem. Code § 11.1035

History. Added by Acts 2013, 83rd Leg. - Regular Session, ch. 1224, Sec. 8, eff. 9/1/2013.

§ 11.104. Notice To Office Of Court Administration; Dissemination Of List.

Texas Statutes

Civil Practice and Remedies Code

Title 2. Trial, Judgment, And Appeal

Subtitle A. General Provisions

Chapter 11. Vexatious Litigants

Subchapter C. Prohibiting Filing Of New Litigation

Current through 2017 Special Session

§ 11.104. Notice To Office Of Court Administration; Dissemination Of List

- (a) A clerk of a court shall provide the Office of Court Administration of the Texas Judicial System a copy of any prefiling order issued under Section 11.101 not later than the 30th day after the date the prefiling order is signed.
- (b) The Office of Court Administration of the Texas Judicial System shall post on the agency's Internet website a list of vexatious litigants subject to prefiling orders under Section 11.101. On request of a person designated a vexatious litigant, the list shall indicate whether the person designated a vexatious litigant has filed an appeal of that designation.
- (c) The Office of Court Administration of the Texas Judicial System may not remove the name of a vexatious litigant subject to a prefiling order under Section 11.101 from the agency's Internet website unless the office receives a written order from the court that entered the prefiling order or from an appellate court. An order of removal affects only a prefiling order entered under Section 11.101 by the same court. A court of appeals decision reversing a prefiling order entered under Section 11.101 affects only the validity of an order entered by the reversed court.

Cite as Tex. Civ. Prac. and Rem. Code § 11.104

History. Amended by Acts 2013, 83rd Leg. - Regular Session, ch. 1224, Sec. 9, eff. 9/1/2013.

Amended by Acts 2011, 82nd Leg., 1st C.S., Ch. 3, Sec. 9.05, eff. January 1, 2012.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.